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In The

# Supreme Court of the United States

JAMES LAWRENCE LATIMER,

*Petitioner,*

v.

SHERRY BURT, Warden,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES LAWRENCE LATIMER,

Petitioner,

v.

SHERRY BURT,

Respondent. /

CASE NO. 01-CV 60198-AA

JUDGE MARIANNE O. BATTANI

MAGISTRATE JUDGE PAUL J. KOMIVES

# REPORT AND RECOMMENDATION

(Filed Jun. 17, 2002)

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I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT:

A. *Procedural History*

1. Petitioner James Lawrence Latimer is a state prisoner, currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan.

2. On April 15, 1998, petitioner was convicted of one count of first degree premeditated murder, MICH. COMP. LAWS § 750.316, and one count of possessing a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b, following a jury trial in the Oakland County Circuit Court. On May 22, 1998, he was sentenced to a mandatory term of life imprisonment without possibility of parole on the murder conviction, and to a mandatory consecutive term of two years' imprisonment on the firearm conviction.

3. Petitioner appealed as of right to the Michigan Court of Appeals, raising the following claims:

> I. DEFENDANT APPELLANT WAS DENIED A FAIR TRIAL, AND HIS CONSTITUTIONALLY GUARANTEED RIGHTS OF CONFRONTATION, BY THE TRIAL COURTS IMPROPER RESTRICTIONS ON HIS CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESSES.

II. DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL BY THE COURTS' INSTRUCTIONS TO THE JURY, WHICH DID NOT FAIRLY CAUTION THE JURY REGARDING CRITICAL QUESTIONS OF WITNESS CREDIBILITY, AND DID NOT PRESENT THE JURY WITH THE ISSUE OF IMPERFECT SELF-DEFENSE.

The court of appeals found no merit to petitioner's claims, and affirmed the conviction and sentence. *See People v. Latimer,* No. 212172, 2000 WL 33521031 (Mich. Ct. App. Mar. 28, 2000) (per curiam).

4. Petitioner sought leave to appeal these issues to the Michigan Supreme Court. The Supreme Court denied petitioner's application for leave to appeal in a standard order. *See People v. Latimer,* 463 Mich. 877, 618 N.W.2d 594 (2000).

5. Petitioner, through counsel, filed the instant application for a writ of habeas corpus on September 26, 2001. He raises the same grounds for writ of habeas corpus that he raised in the Michigan Court of Appeals, except that his claim of instructional error is limited to the court's credibility instructions, and omits his claim that the court should have instructed the jury on imperfect self-defense.

6. Respondent filed her answer on April 8, 2002. She contends that petitioner's claims are without merit.

B. *Factual Background*

Petitioner was convicted of murder in connection with the August 26, 1997, shooting death of Robert Minauro in the basement of petitioner's home. Petitioner did not

dispute that he shot Minauro, but contended at trial that he did so in self-defense. Although other evidence was presented at trial, the principal evidence against petitioner came from three witnesses – William Heath, John Richardson, and Matthew Dumas – and it is their testimony that is relevant to petitioner's habeas claims.

Richardson was the only other person present at the time of the shooting. He was a friend of both petitioner and Minauro. *See* Trial Tr., Vol. III, at 52-55. He testified that, in July of 1997, Minauro gave him $5000, which he in turn gave to petitioner. Petitioner had asked Richardson if he could get some money so that petitioner could purchase some LSD in California. The money was a loan, to be repaid in 30 days at double the amount of the loan. Richardson characterized himself as a sort of "middle man" in the loan transaction. *See id.* at 56-57. Richardson gave the money to petitioner, and told him to be prepared to pay back $10,000 in 30 days. Several days later, petitioner returned from California with a large quantity of LSD. *See id* at 57-63.

Several days before the repayment was due, petitioner told Richardson that he would not be able to repay the money. Minauro demanded to meet with petitioner, and a meeting was arranged for August 19, at petitioner's home. At the meeting, Minauro demanded his money and threatened petitioner with physical harm, but did not threaten to kill him and did not have any weapon on him. *See id.* at 63-68. Richardson spoke with petitioner later in the day, and petitioner threatened to kill Minauro. *See id.* at 69.

Richardson arranged a second meeting between petitioner and Minauro to discuss the repayment situation. This meeting took place at a restaurant on August

25. *See id.* at 69-70. At that meeting, petitioner wanted Minauro to come up with an additional $15,000 so that petitioner could purchase 150 pounds of marijuana. The profit from the resale would be used to repay the initial $10,000 and the additional $15,000. *See id.* at 70-73. A meeting was arranged for the next day, when the marijuana was supposed to be delivered, at petitioner's home. *See id.* at 74. After the meeting at the restaurant, petitioner told Richardson that he was going to kill Minauro. *See id.* at 75.

The following day, August 26, Richardson contacted Minauro at about 11 a.m., and Minauro arrived at Richardson's home about a half hour later. Richardson then called petitioner to tell them that they could do the deal. Richardson and Minauro traveled to petitioner's house together, in Minauro's car. They had with them a digital scale to weigh the marijuana, which was kept in a duffel bag. *See id.* at 78-80, 84-85. After arriving at petitioner's house, the three eventually went down into petitioner's basement to complete the transaction. Petitioner told Minauro that the marijuana was in a box in a corner of the basement. Minauro bent down and looked through the box, but was unable to find anything. As he stood back up petitioner, who was standing about nine feet away, shot Minauro. Richardson did not hear Minauro say anything. *See id.* at 95-100.

After the shooting, Richardson attempted to take the gun away from petitioner. Petitioner pulled back, and Richardson pleaded not to be shot. Petitioner indicated that he was not going to shoot Richardson, and the two went upstairs. As they did so, petitioner was crying and saying that he "didn't want to do it." Richardson eventually secured

the gun and emptied the bullets before returning it to petitioner. *See id.* at 101-09.

On the following day, petitioner called Richardson, and Richardson advised petitioner to turn himself in to the police. Petitioner called Richardson a second time, and Richardson recorded the call. *See id.* at 122-23. Richardson went to the Oakland County Sheriff's Department later in the day, and gave a statement to detectives. He did not tell the detectives about the loan of the money and the drug transactions because he did not want to implicate himself. *See id.* at 127-29. Richardson testified that Minauro did not have a gun or any other weapon on the day of the murder and never threatened petitioner at any time, and that petitioner did not indicate at any time that he was frightened by Minauro. He testified that there was no self-defense involved in the shooting. *See id.* at 130-32.

Although Richardson's testimony was most central to its case, the prosecution also relied heavily on the testimony of Heath and Dumas. Heath testified that he was an inmate at the Oakland County Jail and shared a cell with petitioner in December 1997. Heath testified that petitioner, over the course of several conversations, admitted to shooting Minauro, and indicated that he did so to rob Minauro of the money he was supposedly bringing to purchase the marijuana. Petitioner admitted that Minauro did not have a gun and had not threatened him. *See id.* at 15-21. Dumas testified that he had known petitioner for a number of years, and saw him in the clinic at the Oakland County Jail. Dumas, aware of the pending murder charge, asked petitioner what had happened. Petitioner indicated that, as they were going down the stairs to the basement, Minauro put something in his back, and indicated that he was going to rob petitioner of the marijuana. When

Minauro came from behind him to look at the marijuana, petitioner had a chance to shoot and did so. Petitioner did not indicate to Dumas that Minauro was armed, or that he had placed a weapon in petitioner's back. *See* Trial Tr., Vol. V, at 14-23.

C. *Standard of Review*

Because petitioner's application was filed after April 24, 1996, his petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). *See Lindh v. Murphy,* 521 U.S. 320, 326-27 (1997). Amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court recently explained the operation of § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362 (2000),

the Court explained that "the 'contrary to' and 'unreasonable application'. clauses [have] independent meaning." *Id.* at 405.[1] With respect to the "contrary to" clause, the Court explained that a state court decision will be contrary to clearly established law in two situations. First, "a state-court decision will certainly be contrary to . . . clearly established precedent if the state applies a rule that contradicts the governing law set forth in [the Court's] cases." *Id.* Second, "a state-court decision will also be contrary to [the] Court's clearly established precedent if that state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." *Id.* at 406. "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [the Court's] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* Such a case is therefore governed by the "unreasonable application" language of § 2254(d)(1).

With respect to the "unreasonable application" language, the Court provided somewhat less guidance. The Court did reject the subjective "not debatable among reasonable Jurists" standard that had been adopted by a

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[1] The following discussion comes from Part II of Justice O'Connor's opinion in *Williams*. Although Justice Stevens wrote the opinion for the Court in several other respects, Part II of his opinion, in which he discusses the standard or review under § 2254(d)(1), was joined only by three other Justices (Justices Souter, Ginsberg, and Breyer). Part II of Justice O'Connor's opinion, also discussing the standard of review, was joined by four other Justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas). Thus, Justice O'Connor's opinion constitutes the opinion of the Court with respect to the standard of review under the AEDPA (except for one footnote, citing to legislative history, in which Justice Scalia did not join).

number of Courts of Appeals. *See id.* at 409-10. And the Court clarified that "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410. Beyond that however, the Court simply noted that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable," *id.* at 409, and explained that "[t]he term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410; *cf. Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J.) (noting that "obscenity" is hard to define "[b]ut I know it when I see it.").

By its terms, § 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with "clearly established federal law as determined by the Supreme Court." Thus, "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams,* 529 U.S. at 412.[2] Further, the "phrase refers to the holdings, as

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[2] This does not mean, however, that the decisions of lower federal courts are entirely irrelevant. First of all, this Court is bound by pertinent decisions of the United States Court of Appeals for the Sixth Circuit. *See Timmreck v. United States*, 577 F.2d 372, 374 n.6 (6th Cir. *1978), rev 'd on other grounds,* 441 U.S. 780 (1979); *Conrad v. Rofin-Sinar, Inc.*, 762 F. Supp. 167, 172 (E.D. Mich. 1978). Thus, to the extent that the Sixth Circuit has held that certain Supreme Court cases "clearly establish" federal law in certain respects, this Court is bound by those determinations, regardless of whether this Court would interpret the Supreme Court precedent differently. Further, although the federal court is limited to Supreme Court precedent in determining whether a particular right is clearly established, "[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of

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opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Id.* However, the Supreme Court need not have decided a factually identical case for the law to be "clearly established;" rather, the law is clearly established to the extent that the relevant Supreme Court precedent fairly can be said to require a particular result or a particular mode of analysis given the facts and legal claims involved in the petitioner's case, regardless of whether the Supreme Court has decided the precise issue presented. *See id.* at 391 (internal quotation and citation omitted) (that a particular test "of necessity requires a case-by-case examination of the evidence obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the] Court.").[3]

D. *Confrontation Claims (Claim I)*

Petitioner first contends that he was denied his right to confront the witnesses against him by the trial court's limitations on his cross-examination of Richardson, Heath, and Dumas. At trial, petitioner sought to cross-examine Richardson concerning a 1992 trial in the United States District Court for the Southern District of Iowa, in connection with a drug conspiracy. Petitioner sought to question Richardson about his testimony at that trial on two bases: "first, that it constitutes clear evidence of perjury, and so is clearly relevant to credibility, and, second, because his

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the state court's treatment of the contested issue." *O'Brien v. DuBois*, 145 F.3d 16, 25 (1st Cir. 1998).

[3] This language is from Part III of Justice Stevens's opinion, which was joined by a majority of the Court.

conduct in that case – of seeking to avoid criminal responsibility by falsely claiming to have been merely an unwitting, innocent bystander, so closely echoes his conduct in the case at bar as to be admissible as evidence of plan, system, and scheme." Mem. Br. in Supp. of Pet. for Writ of Habeas Corpus, at 12.

With respect to Heath, petitioner sought to explore three areas on cross-examination. First, he wanted to question Heath about a hearing on a motion to reduce bond which Heath filed in relation to another case on which he was incarcerated. At the hearing, it came out that Heath had attempted to tamper with witnesses and destroy evidence in that case. Petitioner sought to question Heath about these matters because, in light of the pending charges against Heath, he might have a motive to offer testimony helpful to the prosecution. Second, petitioner sought to question Heath about his employment, to place Heath in the context of the community." Third, petitioner wanted to question Heath about his use of lies and deceit in the operation of his business, as such evidence would bear on Heath's credibility. The trial court prohibited most of this testimony, but did allow cross-examination on the fact that Heath had felony charges pending against him and the possibly penalties should Heath be convicted of those charges. *See* Trial Tr., Vol. III, at 7-8.

Finally, with respect to Dumas, petitioner sought to cross-examine him concerning his numerous previous misdemeanors and petty offenses. Petitioner theorized that, because Dumas had so often been prosecuted for such offenses and violated the terms of his probation, he was likely to come before the Oakland County Prosecutor again, and therefore had a motive to testify favorably to the prosecution. Petitioner also sought to question Dumas

about lies he had told to judges in connection with these cases.

Petitioner argues that the trial court denied him his right to confront the witnesses against him by limiting his cross-examination on these matters. The Court should conclude that neither the trial court's rulings nor the court of appeals's affirmance of those rulings resulted in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law.

1. *Clearly Established Law*

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause is applicable to the states through the 14th Amendment's Due Process Clause. *Pointer v. Texas,* 480 U.S. 400, 406 (1965). The Supreme Court's "Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 18 (1985) (per curiam). The latter category, which is implicated in petitioner's claims, recognizes that "[c]onfrontation means more than being allowed to confront the witness physically." *Davis v. Alaska,* 415 U.S. 308, 315 (1974). Thus, in cases where the trial court has restricted cross-examination in some manner, "the Court has recognized that Confrontation Clause questions will arise because such restrictions may 'effectively . . . emasculate

the right of cross-examination itself.'" *Fensterer,* 474 U.S. at 19 (quoting *Smith v. Illinois,* 390 U.S. 129, 131 (1968)).

However, the Supreme Court has also explained that the Confrontation Clause does not "guarantee cross-examination that is effective in whatever way and to whatever extent the defense might wish." *Fensterer,* 474 U.S. at 20. The question is whether the trial court's ruling allowed for "substantial compliance with the purposes behind the confrontation requirement," or, put another way, whether petitioner was "significantly limited in any way in the scope or nature of his cross-examination." *Green,* 399 U.S. at 166. Thus, "[s]o long as cross-examination elicits adequate information to allow a jury to assess a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised by a limitation on cross-examination." *United States v. Cueto,* 151 F.3d 620, 638 (7th Cir. 1998); *see also, United States v. Larranaga,* 787 F.2d 489, 498 (10th Cir. 1986).

2. *Analysis*

In support of his claim, petitioner relies principally upon the Supreme Court's decision in *Davis v. Alaska, supra.* In that case, the Court held that the Sixth Amendment right to confront witnesses guarantees a criminal defendant the right to cross-examine adverse witnesses to expose bias and motivations for testifying. *See id.* at 315-16; *see also, Delaware v. Van Arsdall,* 475 U.S. 673, 678-80 (1986). However, the *Davis* Court limited its Confrontation Clause decision to those facts going to a witness's bias or motive in testifying, as opposed to general attacks on credibility. The Court's decision in *Van Arsdall* was similarly limited. Indeed, in his concurring opinion in *Davis,*

Justice Stewart emphasized that the *Davis* "Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination" concerning past convictions. *Davis,* 415 U.S. at 321 (Stewart, J., concurring).

Thus, there is no clearly established federal law as determined by the Supreme Court, within the meaning of § 2254(d)(1), which establishes a criminal defendant's right to cross-examine a witness to expose issues relating to general credibility, as opposed to bias and motives for testifying. As the Sixth Circuit has explained:

> although *Davis* trumpets the vital role cross-examination can play in casting doubt on a witness's credibility, not all conceivable methods of undermining credibility are constitutionally guaranteed. In particular, the *Davis* Court distinguished between a "general attack" on the credibility of a witness – in which the cross-examiner "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" – and a more particular attach on credibility "directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand."

*Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000) (quoting *Davis,* 415 U.S. at 316). The Court in *Davis* found only the latter, particularized attack on bias and motivation, to be a protected aspect of the right to confrontation. *See Boggs,* 226 F.3d at 737. As the Sixth Circuit explained in *Boggs,* "[c]ourts after *Davis* and *Van Arsdall* have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence – that cross-examination as to bias,

motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not." *Boggs,* 226 F.3d at 737; *see also, Quinn v. Haynes,* 234 F.3d 837, 844-45 (4th Cir. 2000); *Reiger v. Christensen,* 789 F.2d 1425, 1433 (9th Cir. 1986).

Here, most of the areas which petitioner wished to explore on cross-examination of Richardson, Heath, and Dumas went to general credibility. Richardson's alleged perjury in the federal trial in Iowa, Heath's attempts at witness tampering and his employment background and use of lies in his business, and Dumas' previous convictions and representations to the state courts all went to the general credibility of the witnesses. It matters not, as petitioner attempts to emphasize, that the credibility of these witnesses was central to the prosecution's case:

> No matter how cental [sic] an accuser's credibility is to a case . . . the Constitution does not *require* that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct. In other words, [petitioner]'s argument that credibility is crucial to this case, and that therefore any evidence bearing on credibility must be allowed in, simply does not reflect Sixth Amendment caselaw. Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser.

*Boggs,* 226 F.3d at 740 (emphasis in original).

The only two areas of cross-examination limited by the trial court which arguably went to bias or motive were Heath's pending criminal charges, which went to his motive to testify favorably to the prosecution, and Dumas's

recurring appearance before the courts on misdemeanor charges. As to Heath, petitioner was allowed to bring out the fact of his pending charges and the possible sentences he faced. Although petitioner was precluded from going into the details of each charge, this information was sufficient to point out to the jury Heath's motivation to testify favorably to the prosecution, which is all that the Confrontation Clause requires. *See Boggs,* 226 F.3d at 739 (if trial court impermissibly restricts cross-examination on motive or bias, relief is still not available if "the jury had enough information, despite the limits placed on otherwise permitted cross-examination, to assess the defense theory of bias or improper motive."). As to Dumas, he had no charges pending at the time of his testimony; petitioner merely speculated that, due to Dumas's recidivist nature he would again be before the prosecutor and courts, and thus had a motive to testify favorably to the prosecution. *See United States v. Ong,* 541 F.2d 331, 342 (2d Cir. 1976) ("We do not believe that the Court in *Davis* meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the hope that some basis for implying an ulterior motive might be found.").[4]

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[4] Petitioner relies primarily on *Davis* and *Van Arsdall* in support of his claim. I have explained above why these cases do not support petitioner's claim for relief. Petitioner also relies heavily on two other cases, *Alford v. United States,* 282 U.S. 687 (1931) and *Olden v. Kentucky,* 488 U.S. 227 (1988). Neither of these cases supports petitioner's confrontation claims. Both of these cases were bias/motive cases, not general credibility cases. *See Alford,* 282 U.S. at 693; *Olden,* 488 U.S. at 231-32. The Supreme Court has repeatedly described *Alford* as a bias/motive case. *See Davis,* 415 U.S. at 317-18; *United States v. Abel,* 469 U.S. 45, 49 (1984). And, although the Supreme Court has not cited *Olden* since that case was decided, the federal courts of appeals likewise describe *Olden* as a bias/motive case. *See Boggs,* 237 F.3d at 737; *Quinn,* 234 F.3d at 844. Thus, for the same reasons that *Davis* and

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Finally, even if there was some restriction by the trial court on legitimate cross-examination, petitioner cannot show that he is entitled to habeas relief. As noted above, even where proper cross-examination has been limited, habeas relief is not available if the jury had before it enough information to assess the witnesses' credibility and motives for testifying. *See Boggs,* 226 F.3d at 739. The trial record in this case demonstrates that counsel for petitioner had ample opportunity to attack the credibility and motivations of Richardson, Heath, and Dumas. With respect to Richardson in particular, "the jury had ample evidence of other prior statements made by Richardson to evaluate his credibility. . . . Specifically, Richardson testified that he had lied or withheld information in this case about the drug transactions, when first interviewed by detectives, because he did not want to be implicated in drug charges." *Latimer,* 2000 WL 33521031, at *2, slip op. at 2-3. In these circumstances, "the jury had sufficient information to make a discriminating appraisal of [Richardson]'s credibility," *Larranaga*, 787 F.2d at 498, and thus petitioner's right of confrontation was not infringed.

For these reasons, the Court should conclude that petitioner has failed to demonstrate that the trial court's restrictions on his cross-examination of Richardson, Heath, and Dumas violated his Sixth Amendment right to confront the witnesses against him. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this ground.

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*Van Arsdall* do not support petitioner's claims, *Alford* and *Olden* likewise provide petitioner with no basis for habeas relief.

E. *Instructional Error Claim (Claim II)*

Petitioner next contends that the trial court erred by giving special instructions relating to the credibility of accomplices and informants. The Court should conclude that petitioner is not entitled to habeas relief on this basis.

1. *Clearly Established Law*

It is well established that habeas corpus is not available to remedy a state court's error in the application of state law. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Jackson v. Yist,* 921 F.2d 882, 885 (9th Cir. 1990) (a federal court on habeas review "ha[s] no authority to review a state's application of its own laws). Thus, in order for habeas corpus relief to be warranted on the basis of incorrect Jury instructions, a petitioner must show more than that the instructions are undesirable, erroneous or universally condemned; rather, taken as a whole, they must be so infirm that they rendered the entire trial fundamentally unfair. *See Estelle,* 502 U.S. at 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986); *cf. United States v. Sheffey,* 57 F.3d 1419, 1429-30 (6th Cir. 1995) (standard of review for jury instructions challenged on direct criminal appeal). As the Supreme Court noted in *Estelle,* the Court should "also bear in mind [the Supreme Court's] previous admonition that we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Estelle,* 502 U.S. at 72-73 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

2. *Analysis*

*a. Accomplice Witness Instruction*

Petitioner first contends that the trial court should have given an instruction that accomplice testimony should be viewed with extreme caution. Petitioner's theory was that, although Richardson was not an accomplice to the murder itself, he was an accomplice to the drug transactions leading up to the murder, and thus the accomplice witness instruction should have been given.

Petitioner cannot show that he is entitled to relief on this ground. First, the trial court determined, and the court of appeals agreed, that the accomplice witness instruction was not appropriate because Richardson was not an accomplice to the crime with which petitioner was charged. There is nothing unreasonable in this conclusion, or in the state courts' conclusions that an accomplice witness instruction was not required where, as here, the witness was an accomplice to a separate crime not the subject of the petitioner's prosecution. More fundamentally, the federal courts have repeatedly held that a criminal defendant has no constitutional right to an accomplice witness instruction, and thus the failure of a state court to give such an instruction does not provide a basis for granting habeas relief. *See Scott v. Mitchell*, 209 F.3d 854, 883 (6th Cir. 2000); *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir. 1995); *Takacs v. Engle*, 768 F.2d 122, 127 (6th Cir. 1985); *Grant v. Rivers*, 920 F. Supp. 769, 783 (E.D. Mich. 1996) (Gadola, J.); *Smithwick v. Walker*, 758 F. Supp. 178, 186 (S.D.N.Y.), *aff'd*, 948 F.2d 1278 (2d Cir. 1991). This is particularly true where, as here, the trial court did give a general instruction that the jury is to determine the credibility of all the witnesses. *See Kappos*, 54 F.3d at 367.

Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

*b. Informant Instruction*

With respect to the testimony of Heath and Dumas, petitioner contends that the trial court should have given an instruction that informant testimony should also be examined with great caution. As with an accomplice witness instruction, there is no constitutional requirement that a court give an informant instruction, and petitioner is entitled to relief only if he can show that the failure to give the instruction deprived him of a fair trial. *See Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir. 1999); *Fulgham v. Rees*, No. 89-16244, 1990 WL 75510, at *3 (9th Cir. June 7, 1990); *Scott v. Anderson*, 58 F. Supp. 2d 767, 805 (N.D. Ohio 1998), *rev'd on other grounds sub nom. Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000).

Petitioner cannot show that he was denied a fair trial by the court's failure to give a specific informant testimony instruction. As explained above, "[d]efense counsel had ample opportunity to attack [Heath's and Dumas's] credibility and was able to bring to the jury's attention the fact that [they were] not . . . disinterested witnesses." *Gibson*, 197 F.3d at 460. Further, "the trial court instructed the jurors that it remained their responsibility to determine a witness's credibility, after considering, among other things, any bias, prejudice or interest the witness might have in the outcome of the trial." *Id.; see* Trial Tr., Vol. VI, at 107-09. In these circumstances, petitioner cannot show that he was denied a fair trial by the trial court's failure to give a specific informant witness instruction. *See United States v. Jordan*, 223 F.3d 676, 692 (7th Cir. 2000); *Gibson*, 197 F.3d

at 460; *Scott*, 58 F. Supp. 2d at 805. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

F. *Conclusion*

In view of the foregoing, the Court should conclude that the Michigan Court of Appeals's rejection of petitioner's claims did not result in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law. Accordingly, the Court should deny petitioner's application for the writ of habeas corpus.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives
PAUL J. KOMIVES
UNITED STATES
MAGISTRATE JUDGE

Dated: June 17, 2002